DATE: JANUARY 27, 2000

CASE NO: 1998-CAA-9

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In the Matter of

Brian Ferguson,
Complainant,

v.

Weststar, Inc.,
Respondents.

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Appearances: Randy W. Loun, Esq.
For the Complainant

James Victor Ness
For the Respondent

Before: Thomas M. Burke
Associate Chief Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This matter arises under the employee protection provisions of the Clean Air Act (CAA), 42 U.S.C. § 7622, and the Federal Water Pollution Control Act (FWPCA), 33 U.S.C. § 1367. These statutes prohibit an employer from discharging or otherwise discriminating against an employee who has engaged in activity protected under the CAA and FWPCA. The CAA and FWPCA are implemented by regulations designed to protect so-called "whistleblower" employees from retaliatory or discriminatory action by their employers. 29 C.F.R. Part 24. An employee who believes that he or she has been discriminated against in violation of these acts may file a complaint within 30 days after the occurrence of the alleged violation.

Complainant, Brian Ferguson, filed a complaint with the U.S. Department of Labor, Occupational Safety and Health Administration (OSHA) on February 12, 1998, alleging retaliation for protected activities under the environmental whistleblower statutes. OSHA investigated the complaint and found it to have merit in a letter dated June 29, 1998. (ALJX 1). Respondent, Weststar, Inc. (Weststar), filed an appeal with the Office of Administrative Law Judges on July 2, 1998. A formal hearing was held before the undersigned Administrative Law

Judge on August 18 and 19, 1999, in Seattle, Washington.

Findings of Fact

Weststar is a company located in Alpine, California that specializes in the application of specialty coatings and lining systems for fuel and water storage facilities for federal, state, and local governments. Weststar received a federal contract in 1996 for the sandblasting and removal of lead-based paint from the hammerhead crane at the U.S. Puget Sound Naval Shipyard (PSNS) in Bremerton, Washington. The PSNS hammerhead crane is 250 feet tall and 80 feet wide with a lifting capacity of 250 tons and is primarily used in the overhaul and tearing apart of ships at the shipyard. Weststar enclosed the crane in a negative air flow containment to ensure that all of the particle matter would be retained within the coverage of the tent during sandblasting.

Complainant worked on the hammerhead crane project for Weststar from June, 1996 through January 16, 1997 under the supervision of James Ness, Project Superintendent. Complainant's primary job was grit recovery; the term "grit" refers to the byproduct of the sandblasting procedure that consists of a combination of the metal shavings used in the sandblasting and the lead paint stripped from the crane. Complainant's job duties included sweeping up grit from the sandblaster with a broom, picking up the grit with a magnet, and vacuuming it up with a four-inch hose. When it rained, Complainant dried out the grit with a torch in order to allow it to be sucked up with the hose without clogging the machines.

On August 28, 1997, after Complainant had worked for Weststar for approximately three months, Complainant and his family went to their physician for routine physical examinations because their health insurance was ending. Complainant requested that his blood be tested for lead since he had recently noticed that he was frequently tired and his joints ached. Subsequently, on October 10, 1997, the state of Washington Department of Labor and Industries Safety and Health Assessment and Research for Prevention (SHARP) program[1] notified Complainant that he had an elevated blood level of 66µg/dl and referred him to Harborview Hospital. Complainant contacted a physician at Harborview, and the physician recommended that Complainant's wife and children also be tested for lead poisoning. Complainant's family was tested, and Complainant learned that his daughters also had elevated levels of blood lead.

On the day Complainant first learned of his high blood lead level, October 10, 1998, he shared the information with his neighbor Bob Farmer, whom he knew to be an environmental activist. During the conversation, Complainant described to Mr. Farmer several of Weststar's alleged unsafe practices. On the following day, without Complainant's knowledge, Mr. Farmer

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[1]The SHARP program is the reporting agency to which all indications of lead poisoning are reported in the State of Washington. (TR at 84; CX 3).

sent e-mails to several government offices including the EPA and the PSNS office, reporting Weststar's alleged environmental, health, and safety violations.

Weststar first learned of Complainant's high blood lead level when Complainant phoned Weststar's industrial hygiene technician, Bill Ross, after receiving the results of his blood test. On October 14, 1997, Bill Ross approached Complainant and questioned him about Mr. Farmer's e-mail. The following day, Complainant was required to attend a meeting to discuss the e-mail message. Those in attendance included Mr. Ness and individuals from the ROICC office. The ROICC--which stands for "resident officer in charge of construction"-- is employed by the federal government to monitor private contractors and enforce contract compliance. When questioned about Mr. Farmer's e-mail, Claimant explained that he told Mr. Farmer about his lead poisoning and the alleged environmental and safety violations, but did not anticipate that Mr. Farmer would report the information to government authorities. As a result of Complainant's high blood lead levels, Weststar changed his job duties so as to keep him outside of the containment. For the remainder of Complainant's employment with Weststar, he worked on the pier cleaning up grit that had escaped out of the containment.

Shortly thereafter, OSHA informed Weststar that it would be inspecting the hammerhead crane work site. OSHA had been notified by the Washington State Blood Lead Reporting system, SHARP, that several Weststar employees, including Complainant, had acquired high blood lead levels. (TR at 83). In anticipation of the OSHA visit, Weststar cleaned up the site, which entailed cleaning and repairing the inside of the containment to get rid of all of the grit and installing a downdraft, the purpose of which is to suck up the lead and grit dust in the air created by the blasting. Weststar also cleaned the showers and designated a "clean side" and a "dirty side" in the shower house.

OSHA inspected the Weststar work site during the period October 20, 1997 to December 9, 1997. As a part of their investigation, the OSHA investigators interviewed several Weststar employees, including Complainant, regarding the working conditions at the site. Complainant's supervisor and coworkers were aware of which employees were interviewed by OSHA because those employees were noticeably absent from their work stations while they were speaking with the investigators. During his interview, Complainant confirmed the existence of problems at the work site. In particular, the investigators asked Complainant about the showers, and he told them that, prior to OSHA's visit, the showers were not in working condition. As a result of the investigation, OSHA cited Weststar for serious health and safety violations and assessed the company with a fine.

After the OSHA visit, Complainant's coworkers began a pattern of harassment that continued throughout the remainder of Complainant's employment with Weststar. Most of the instigators of the harassment were relatives of Mr. Ness, including Mr. Ness's son, his brother

John Ness and his stepbrother Charles Bowman. Complainant's coworkers repeatedly accused him of planning to sue the company, and they called him a "narc."[2] On one occasion, they made fun of Complainant's underwear, saying that he was wearing women's bikini underwear. Weststar's industrial hygiene technician, Bill Ross, also participated in the harassment, telling fellow employees to "watch out for Ferguson, he has a lawyer."

Complainant spoke with Mr. Ness about the harassment on more than one occasion, but to no avail. Mr. Ness did not take Complainant's grievances seriously; he assumed that the harassment directed at Complainant was mere horseplay, typical of that commonly engaged in at the work site. He told the employees involved to "cut it out," but did not take any further action.

Complainant's anxiety at work intensified when several pieces of scaffolding fell and came close to hitting him as the containment was being taken down. After Complainant experienced more than one near-miss incident, he became suspicious that coworkers were purposefully attempting to scare him or cause him bodily harm. Complainant's suspicions were heightened when the grandson of the owner of the company approached Complainant and cryptically warned him to "watch out for falling nuts." Complainant found this warning particularly disturbing because he had noticed during one of the aforementioned incidents that some nuts had fallen along with the scaffolding.

On January 16, 1998, Complainant witnessed a large piece of aluminum scaffolding fall from the containment and damage the roof of a nearby building. Complainant informed Mr. Ness of the incident, and Mr. Ness sent him up into the crane to find out why the object had fallen. While up in the crane, Complainant encountered Mr. Ness's stepbrother Charles Bowman who reacted angrily to Complainant's query as to who was responsible for the fallen scaffolding. In his anger, Mr. Bowman cursed at Complainant, called him a "narc," and threatened him with the Stanley retractable blade razor knife that he had been using in his work. When Complainant returned to the ground and told Mr. Ness about the incident, Mr. Ness attempted to resolve the conflict by having Complainant and Mr. Bowman shake hands.

Still scared and upset from the knife incident, Complainant collected his paycheck and went home. In his distress, Complainant went to see Mr. Farmer. At Mr. Farmer's recommendation, Complainant, his father, and Mr. Farmer proceeded to the PSNS police department to file an assault charge.

After filing the charge, Complainant returned to the work site with a police escort so he could gather his belongings from his locker. Mr. Ness was there and witnessed Complainant packing his belongings. Mr. Ness asked Complainant what he was doing and repeatedly

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[2]The term "narc" is a slang term meaning an informant or snitch. (TR at 193).

questioned him as to whether he was quitting. Continuing his interrogation, Mr. Ness followed Complainant to his car as he was leaving, and Complaint finally responded "yes" out of exasperation.

The following Monday, January 19, 1999, Complainant called in sick. He never returned to the hammerhead crane work site thereafter, and received no further compensation from Weststar. A few days after his last day of work for Weststar, Complainant faxed Mr. Ness a letter expressing his desire to return to work and requesting Mr. Ness's assistance in handling the threats made against him at the work site. (CX 5). Although Mr. Ness received the letter, he never responded.

Conclusions of Law

The CAA's employee protection provisions provide in relevant part:

> No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee . . .
>
> > (1) commenced, caused to be commenced, or is about to commence a proceeding under this chapter . . .
> >
> > (3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other action to carry out the purposes of this chapter.

42 U.S.C. § 7622(a).

In order to prevail on an action under the CAA's employee protection provisions, a complainant must establish that: (1) the complainant engaged in protected activity; (2) the employer took adverse action against the complainant; (3) the employer was aware of the protected activity at the time it took the adverse action; and (4) the protected activity was the likely reason for the employer's adverse action against him. *See Tyndall v. United States Environmental Protection Agency*, 1993-CAA-6, 1995-CAA-5 (ARB June 14, 1996); *Jackson v. The Comfort Inn, Downtown*, 1993-CAA-7 (Sec'y, Mar. 16, 1995).

Once the complainant has established a *prima facie* case, the respondent has the burden of producing evidence to rebut the presumption of disparate treatment by presenting evidence that the alleged disparate treatment was motivated by legitimate, nondiscriminatory reasons. Significantly, the employer bears only a burden of producing evidence at this point; the ultimate burden of persuasion of the existence of intentional discrimination rests with the employee. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 254-255 (1981); *Dartey v. Zack Company of Chicago*, Case No. 82-ERA-2 (Sec'y April 25, 1983). Once a respondent satisfies

its burden of production, the complainant then may establish that respondent's proffered reason is not the true reason, either by showing that it is not worthy of belief or by showing that a discriminatory reason more likely motivated respondent. *Shusterman v. EBASCO Services, Inc.*, Case No. 87-ERA-27 (Sec'y January 6, 1992).

The Administrative Review Board (the Board) has held that where a case is fully tried on the merits, it is not necessary to determine whether the complainant presented a prima facie case and whether the respondent rebutted that showing. *Adjiri v. Emory University*, 97-ERA-36 (ARB July 14, 1998); *see also Carroll v. Bechtel Power Corp.*, Case No. 91-ERA-46 (Sec'y Feb. 15, 1995), slip op. at 11 n.9, aff'd sub nom. *Carroll v. U.S. Dep't of Labor*, 78 F.3d 352, 356 (8th Cir. 1996). "Once Respondent produces evidence in an attempt to show that Complainant was subjected to adverse action for a legitimate, nondiscriminatory reason, it no longer serves any analytical purpose to answer the question whether the complainant presented a *prima facie* case. Instead the relevant inquiry is whether Complainant prevailed by a preponderance of the evidence on the ultimate question of liability." *Id* at 6 (citations omitted).

In light to the foregoing, the evidence presented by Complainant and Respondent will be considered concomitantly to determine whether Complainant has met his ultimate burden of proof under the Acts.

Protected Activity

First, Complainant must show that he engaged in protected activity. In keeping with the principle set forth by the Secretary in *Jenkins v. U.S. Environmental Protection Agency*, 92-CAA-6 (Sec'y May 18, 1994), that the CAA's employee protection provision should be construed broadly, it is determined that Complainant engaged in protected activity on two separate occasions: first, when he told Mr. Farmer about Weststar's alleged violations, which in turn prompted Mr. Farmer to contact several government offices, and second, when he spoke with investigators during OSHA's visit to the work site.

The first protected act occurred when Complainant spoke with his neighbor Mr. Farmer, who subsequently sent an e-mail to the EPA, the PSNS office, and other government offices reporting the subject matter of his conversation with Complainant. Both the initial conversation and the resulting e-mail implicate the CAA and the FWPCA as the initial conversation asserted, and the e-mail repeated, allegations that Weststar burned the lead grit when it became wet, thereby releasing lead into the surrounding air, neglected to repair rips in the containment thereby allowing lead dust to escape into the atmosphere, and permitted grit to wash off the pier into the water. Upon learning of the e-mail, Todd Chapman, the ROICC assigned to the hammerhead crane project, held a meeting with Complainant and Mr. Ness to discuss the contents of the e-mail. At the meeting, Complainant confirmed that he was the source of information for the e-mail

and he repeated the allegations made therein (TR at 39-42). By divulging incriminating information to his neighbor, Complainant set into motion a series of events which resulted in the EPA, the ROICC, and other government officials being informed of Weststar's environmental violations, even though Complainant did not contact those entities directly. Complainant engaged in protected activity since the statute provides protection for employees who *caused* a proceeding under the Act to be commenced, as well as to those who directly commence a proceeding. 42 U.S.C. § 7622(a).

The Secretary's decisions in *Scott v. Alyeska Pipeline Service Co.*, 92-TSC-2 (Sec'y July 25, 1995), and *Wedderspoon v. City of Cedar Rapids, Iowa*, 80-WPC-1 (Sec'y July 28, 1980), provide support for the position that Complainant's communication with his neighbor was protected activity. In *Scott*the Secretary held that providing information to a private person for transmission to responsible government agencies, or for use in environmental lawsuits against one's employer, is protected activity under the CAA and the FWPCA. In *Wedderspoon*, a case which has facts similar to those in the instant case, the Secretary upheld the ALJ's determination that the complainant engaged in protected activity when the complainant reported safety concerns to a friend who was an environmental activist. The friend, in turn, reported the violations to the local newspaper, who then interviewed complainant about the alleged violations. The ALJ found that, although the complainant did not contact federal or state authorities directly, the "causal nexus" between the complainant's communication with the friend and the newspaper reporter and the subsequent investigation by a state environmental agency was sufficient to fit within the "caused to be initiated" language of the FWPCA. Here, the causal connection between Complainant's conversation with Mr. Farmer and the subsequent meeting with the ROICC is at least as strong as that in *Wedderspoon* and possibly stronger because there is one less link in the causal chain.

In the instant case Complainant did not necessarily intend that Mr. Farmer report the information to government officials. However, his motive for relaying the information is not determinative. In *Diaz-Robainas v. Florida Power & Light Co.*, 92-ERA-10 (Sec'y Jan. 10 1996), the Secretary held that where the complainant has a reasonable belief that the respondent is violating the law, other motives he or she may have for engaging in protected activity are irrelevant. *See also Carter v. Electrical District No. 2 of Pinal County*, 92-TSC-11 (Sec'y July 26, 1995). Complainant's and Mr. Farmer's testimony indicate that at the time of their conversation Complainant held a reasonable belief that Weststar's practices of burning grit, allowing grit to wash off the pier, and neglecting to repair rips in the containment were illegal.

Complainant's second act which constituted protected activity was his cooperation with the OSHA investigators during their visit to the hammerhead crane work site. *See DeFord v. Secretary of Labor*, 700 F.2d 281 (6th Cir. 1983) (holding that participation in on-site government inspections constitutes a protected activity). As a part of its investigation, OSHA spoke with several Weststar employees, including Complainant. During his interview, Complainant told

OSHA about Weststar's poor housekeeping practices. Although OSHA primarily questioned Complainant about occupational safety and health concerns, Complainant also offered information implicating public safety and health concerns and environmental protection issues. *See Post v. Hensel Phelps Construction Co.*, 1994-CAA-13 (Sec'y Aug. 9, 1995) (stating that the environmental whistleblower statutes generally do not protect complaints restricted solely to occupational safety and health, unless the complaints also encompass public safety and health or the environment); *Williams v. TIW Fabrication & Machining, Inc.*, 88-SWD-3 (Sec'y June 24, 1992) (holding that the complainant's communication with an OSHA inspector constituted protected activity because, in addition to providing information about occupational health and safety violations, complainant told OSHA about environmental violations); *Nathaniel v. Westinghouse Hanford Co.*, 91-SWD-2 (Sec'y Feb. 1, 1995), slip op. at 8-9 (holding that the complainant's complaint constituted protected activity even though it merely "touched on" subjects regulated by the pertinent statutes). Specifically, Complainant discussed with OSHA the lack of adequate shower facilities at the work site. (TR at 44, 45). Weststar's failure to provide adequate shower facilities for its employees and failure to enforce the practice of showering after every shift posed a public health and safety risk as it allowed workers to leave the work site with lead dust on their clothing and skin. As a result, the workers tracked lead dust into the environment, released it into the surrounding air, and brought it home where their families were exposed to it. Complainant's own situation illustrates the seriousness of the risk which this carelessness posed to workers' families, as his daily practice of bringing home clothes coated in lead dust resulted in both of his daughters suffering from high levels of blood lead. Thus, since Complainant's conversation with the OSHA investigators touched on matters of public health and safety covered by the CAA, it constituted protected activity.

Employer's Adverse Action

Complainant argues that he suffered an adverse employment action by Weststar in the form of constructive discharge. In order to establish that he was constructively discharged, Complainant must prove that working conditions were rendered so difficult, unpleasant, unattractive, or unsafe that a reasonable person would have felt compelled to resign, i.e., that the resignation was involuntary. *Johnson v. Old Dominion Security*, 86-CAA-3 to 5 (Sec'y May 29, 1991), slip op. at 19-22 and n.11; *see also Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1465 (9th Cir. 1994)*; Clark v. Marsh*, 665 F.2d 1168, 1174 (D.C. Cir. 1981) (requiring a showing of "aggravating factors" to substantiate a finding of constructive discharge).

It is determined that Complainant has established that he was constructively discharged. Complainant was continuously harassed by coworkers, most of the harassers being relatives of Mr. Ness, the project superintendent. They repeatedly called him a "narc" and asked him if he was going to sue Weststar. Although it is difficult to determine whether Weststar employees intentionally dropped scaffolding near Complainant in an effort to hurt or scare him, it was reasonable for Complainant to perceive that this was their intention, especially in light of the

cryptic statement made to him by the owner's grandson warning him of "falling nuts" and the other acts of harassment to which he had been subjected. Even Mr. Ness testified that it was conceivable that Complainant's coworkers were purposefully trying to scare Complainant with the falling objects. (TR at 178). The harassment culminated in Complainant being threatened by a coworker who was cursing at him while holding a knife, an incident which forced Complainant to conclude that he could no longer work under such conditions.

Complainant's belief that the work site was unsafe was exacerbated by Weststar's failure to take action on his behalf. Complainant informed Mr. Ness when the harassment first began, and complained to him again after the knife incident; however, Mr. Ness failed to take adequate measures to put an end to the problem. *See Taylor v. Hampton Recreation*, 82-CETA-198, (Sec'y April 24, 1987), slip.op. at 7-9 (finding that the complainant was constructively discharged because, among other reasons, top management had manifested insensitivity and a marked lack of response to the complainant's grievances and requests for assistance); *Marien v. Northeast Nuclear Energy Co.*, 93-ERA-49 and 50 (Sec'y Sept. 18, 1995) (stating that the ERA requires that an employer consider and evaluate allegations of harassment in an open-minded and fair manner). Complainant's predicament was compounded by the fact that most of his harassers were relatives of his supervisor, thereby creating an imbalanced power dynamic. Whether or not Mr. Ness was in fact partial towards his employee relatives to the detriment of Complainant, it was nevertheless reasonable for Complainant to perceive that such a partiality existed, thereby heightening Complainant's sense of helplessness in the face of the constant harassment and threats to which he was subjected.

Therefore, when Complainant resigned on January 16, 1998 he did so because he felt unsafe at work and believed that resignation was his only option. In light of the constant verbal taunting, the ever-present danger of falling objects, and the threat of violence by coworkers -- all occurring within an environment of inaction and indifference on the part of Weststar -- a reasonable person in Complainant's position would have acted accordingly.

Weststar argues that Complainant was not constructively discharged because the company took appropriate measures to quell the harassment. Mr. Ness testified that when the harassment was brought to his attention, he attempted to resolve it. He testified that he believed that his solution to the knife incident, having Complainant and Mr. Bowman shake hands, sufficiently alleviated the tension between the two men (TR at 192). When asked whether he believed that Complainant should have been given more protection, Mr. Ness testified, "I didn't see where Brian needed more protection than he was getting." (TR at 192). However, Complainant's testimony about the harassment he was subjected to is accepted and his perception of the threat to his physical well being from his coworkers was reasonable. Therefore, it is determined that the record supports a finding of constructive discharge.

Employer's Knowledge

Complainant must demonstrate that Weststar was aware of the protected activity at the time it took the adverse action. The record shows that Complainant's supervisor knew about both incidents of protected activity. Mr. Ness, the project superintendent, testified that he was aware of the e-mail sent by Mr. Farmer (TR at 174-175, 198, 201-202), and he knew that Complainant was Mr. Farmer's source of information for the allegations contained therein (TR at 174). Mr. Ness also testified that he was aware that Complainant spoke with OSHA authorities when they visited the job site, and he knew that Complainant provided OSHA with unfavorable information about Weststar's housekeeping practices. (TR at 165). Accordingly, Complainant has established this element of his case.

Causation

Finally, Complainant must establish that the protected activity was the likely reason for the employer's adverse action against him. Temporal proximity is one factor which may be weighed in deciding the ultimate question of whether a complainant has proven by a preponderance of the evidence that retaliation was a motivating factor in the adverse action.
Jackson v. Ketchikan Pulp Co., 93-WPC-7 and 8 (Sec'y Mar. 4, 1996). Here, the constructive discharge occurred only three months after the e-mail complaint and the OSHA interview, strongly suggesting a causal connection. Furthermore, although the constructive discharge occurred three months after the protected activity, the harassment began almost immediately. (TR at 176-77). It is also significant that before the e-mail complaint and the OSHA interview, Complainant had never been harassed by his coworkers, in fact he had been highly regarded as a hardworking, loyal employee by supervisors and coworkers alike. (TR at 187).

The nature of the harassment directed at Complainant likewise implies a retaliatory motive: coworkers' questions regarding whether Complainant was planning to sue and their accusations that Complainant was acting as a "narc" were obviously directed at his whistleblower activity. Mr. Ness admitted as such at the hearing, stating that he could not think of any other reason why Complainant's coworkers would have called him a "narc." (TR at 185).

Based on the foregoing, I find that the Complainant has established that he was constructively discharged by Weststar as a result of his protected activity, in violation of the CAA and the FWCPA.

Damages

The regulations provide that where Respondent has been found to be in violation of a whistleblower statute, the Final Order shall order Respondent to take appropriate affirmative action to abate the violation, including reinstatement of the Complainant to his former or substantially equivalent position, compensation including back pay, terms, conditions, and privileges of that employment. If an employee is found to have been constructively discharged, as in the instant case, reinstatement or front pay may be appropriate and post-resignation back pay would be allowed. Further, where appropriate, Respondent may be ordered to provide compensatory damages to the Complainant, along with all costs including attorney fees and expert witness fees reasonably incurred by the Complainant in connection with the bringing of this complaint. See 29 C.F.R. § 24.6(2), (3).

Here, reinstatement with Weststar is not a feasible remedy. Complainant cannot be reinstated to his previous position on the hammerhead crane project as that project was completed in May of 1998 (TR at 202). Although Weststar continues to manage other projects, the nature of Weststar's business requires the company to change locations frequently and to downsize as each project comes to a close. Thus, Weststar is unable to provide Complainant with steady employment that is close to his home. At the time that Complainant left Weststar, Weststar was managing two other projects in the vicinity of Complainant's home: one at the fuel depot in Manchester, and the other at the Naval Air Station on Whidbey Island. However, the project in Manchester ended shortly after the hammerhead crane project ended (TR at 205) and the project at the Naval Air Station on Whidbey Island, which has also since come to an end, required laborers to possess employment qualifications which Complainant does not have (TR at 206-207). Therefore, the record does not contain evidence of the existence of a current job with Weststar to which Complainant can be reinstated.

Complainant requests back pay. The purpose of back pay is to make the employee whole, that is, to restore the employee to the same position he would have been in if not discriminated against. Back pay awards should, therefore, be based on the earnings the employee would have received but for the discrimination. *Blackburn v. Metric Constructors, Inc.*, 86-ERA-4 (Sec'y Oct. 30, 1991). The back pay award is offset by a complainant's interim earnings in positions he or she could not have held had his or her employment with the respondent continued. *Sprague v. American Nuclear Resources, Inc.*, 92-ERA-37 (Sec'y Dec. 1, 1994). The rate of interest to be applied to back pay awards is that specified in 26 U.S.C. § 6621. *Wells v. Kansas Gas & Electric Co.*, 85-ERA-22 (Sec'y Mar. 21, 1991).

The amount of earnings Complainant would have received from Weststar had he remained on the hammerhead crane project from January 19, 1998 through its completion on May 8, 1998 is $15,760.00 ($985.00 per week x 16 weeks) . Because Complainant began working at his present job at the Puget Sound Naval Shipyard on March 2, 1998, the above-stated amount shall be offset by the amount Complainant earned at PSNS between March 2, 1998 and May 8, 1998,

which was $3,155 ($631.00 x 5 weeks) . (CX 10). Therefore, Complainant is entitled to receive back pay for the period January 16, 1998 through May 8, 1998 in the amount of $12,605 plus applicable interest.

In addition, the record supports the finding that, had Complainant not been constructively discharged, Weststar would have retained him as an employee as long as it was able to provide work compatible with his qualifications. When questioned as to whether Weststar would have kept Complainant as an employee after the hammerhead crane project was completed, assuming that the constructive discharge had never occurred, Mr. Ness responded,

> I would. Brian would have normally been what I call a "keeper" because of his level of responsibility. Showed up for work. He did a good job. And, yes, I would have put him on another job. I've even grabbed guys and asked them to travel with me, and that would have been the case with Brian. I have never had a problem with Brian, up until this issue.

Since Weststar managed another project within the same county as the hammerhead crane project at the Manchester fuel depot (TR 205), and this project continued for a period of time after the hammerhead crane project was completed, it is determined that Weststar would have transferred Complainant to the Manchester worksite upon completion of the hammerhead crane project. However, the record does not support a finding that Complainant would have continued to work for Weststar after completion of the Manchester project, because, as mentioned previously, the only other Weststar project in the area mentioned on the record, the project at the Whidbey Island Naval Air Station, required specialized trade skills which Complainant does not possess, and the record does not contain evidence showing that Complainant would have been willing to travel to another area to continue working with Weststar. Therefore, Complainant is entitled to receive back pay for the period May 8, 1998 until the last day of the Weststar project located in Manchester, to be calculated at the same rate of pay he received at the hammerhead crane project, minus interim earnings. *See Doyle v. Hydro Nuclear Services*, 89-ERA-22 (ALJ Nov. 7, 1995) (awarding back pay beyond the original term of employment where the complainant presented evidence that similarly situated employees were offered jobs by contractor at new work site upon completion of the original project) (citing *Walker v. Ford Motor Co.*, 684 F.2d 1355 (11th Cir. 1982)).

Complainant also requests compensatory damages. In order to recover compensatory damages, a complainant needs to show that he or she experienced mental pain and suffering caused by the unlawful discharge. *Crow v. Noble Roman's, Inc.*, 95-CAA-8 (Sec'y Feb. 26, 1996) (citing *Blackburn v. Maring*, 982 F.2d 125, 131 (4th Cir. 1992) (ERA case)). The circumstances of the case and testimony about physical or mental consequences of retaliatory action may support such an award. *Creekmore v. ABB Power Systems Energy Services, Inc.*, 93-

ERA-24 (Dep. Sec'y Feb. 14, 1996). Competent evidence must prove the existence and magnitude of subjective injuries. *Id.* Interest is not awardable on compensatory damages. *Smith v. Littenberg*, 92-ERA-52 (Sec'y Sept. 6, 1995).

At the hearing Complainant testified that the constructive discharge caused him extreme anxiety to the extent that he sought psychiatric counseling upon the recommendation of his physician. (TR at 90, 262). His testimony was corroborated by that of his wife, Rebecca Ferguson. (TR at 223). Mrs. Ferguson testified that the harassment which Complainant suffered at work created difficulties in their marriage and produced changes in Complainant's personality and emotional state, causing him to feel angry, bitter, and upset and to be drained of emotional and physical energy. (TR at 228-229). Mrs. Ferguson described her husband when he returned home from work on the evening of the knife incident as follows:

> The minute Brian walked in, he was so distressed. He was so emotionally upset that I literally had to very much raise my voice to calm him down. This is not somebody who would–in the state of mind that Brian was in, and the stress level that he was at when he got home, there's no way that he would have left, not being shaken up and upset at the time as well, because he was–he was just really–I mean he was shaking.

(TR 224). To substantiate the amount of money he expended on psychiatric care, Complainant presented bills from his psychiatrist. (CX 6). I find that Complainant has sufficiently demonstrated that he suffered severe emotional distress resulting from his constructive discharge, and that this distress motivated him to seek counseling. It is therefore recommended that he be awarded $10,000 for emotional distress and $540 for reimbursement of psychiatrist's fees.

The amount of $10,000 was derived by reviewing awards in similar whistleblower and other types of wrongful discharge cases involving claims of emotional distress. *See Leveille v. New York Air National Guard*, ARB No. 98-079, ALJ Nos. 1994-TSC-3 and 4 (ARB Oct. 25, 1999) (reaffirming the longstanding principal that "compensatory damage awards for emotional distress or mental anguish should be similar to awards made in other cases involving comparable degrees of injury"); *Smith v. Esicorp*, ARB No. 97-065, ALJ No. 1993-ERA-16 (ARB Aug. 27, 1998). In *Smith*, the ARB surveyed a series of earlier cases decided by the Secretary and the Board in which awards for compensatory damages ranged from $5,000 where the complainant showed that he became moody and depressed and short tempered with his family, to $75,000 in a case where there was evidence of major depression supported by reports by a psychiatrist and a licensed clinical social worker. *See also Leveille v. New York Air National Guard*, ARB No. 98-079, ALJ Nos. 1994-TSC-3 and 4 (ARB Oct. 25, 1999) (upholding the ALJ's award of $45,000 for emotional distress where the complainant presented evidence of a variety of medical and personal problems, including severe anxiety attacks, inability to concentrate, inability to enjoy life,

and marital conflict); *Martin v. The Dept. of the Army*, ARB No. 96-131, ALJ No. 1993-SDW-1 (ARB July 30, 1999) (awarding $75,000 where the complainant presented evidence that he suffered severe emotional distress manifested by psychological counseling of increasing intensity, several hospitalizations, withdrawal, lack of concentration, and other symptoms).

In cases where the complainant suffered a degree of harm comparable to that proven by Complainant in the instant case, $10,000 is a typical amount awarded for emotional distress. *See, e.g., Lederhaus v. Donald Paschen & Midwest Inspection Service, Ltd.*, 91-ERA-13 (Sec'y Oct. 26, 1992), slip.op. at 11-13 (awarding $10,000 where the complainant showed that he was unemployed for 5 ½ months, he was forced to borrow money and was harassed by bill collectors, he became angry and depressed, and he experienced marital conflict); *McCuistion v. Tennesee Valley Authority*, 89-ERA-6 (Sec'y Nov. 13, 1991), slip. op. at 21-22 (awarding $10,000 where complainant was harassed, blacklisted, and fired; he forfeited life, health, and dental insurance; he was unable to find other employment; the experience exacerbated preexisting hypertension and caused stomach problems and sleeping problems; he suffered from depression and anxiety); *DeFord v. Tennessee Valley Authority*, 81-ERA-1 (Sec'y Apr. 30, 1984), slip. op. at 2-4 (awarding $10,000 where the complainant experienced depression and anxiety and incurred medical expenses related to the termination).

Complainant testified that he also suffered financially as a result of the discharge, as he had to take out high-interest loans to cover his expenses while he was out of work. (TR at 87). As it is clear that Complainant would not have taken out these loans but for his constructive discharge, I further recommend that Complainant be awarded $780.33 as restitution for interest paid as a result of such loans. (CX 5).

Finally, Complainant requests punitive damages equal to the amount of lost wages. (TR at 260). However, no punitive damages will be awarded as neither the CAA nor the FWCPA authorizes the award of punitive damages.

Counsel for Complainant requests that he be awarded a fee in accordance with a contingency fee arrangement he negotiated with Complainant. (TR at 260). However, the U.S. Supreme Court has held that enhancement for contingency is not permitted under federal fee shifting statutes, including those governing whistleblower cases. *City of Burlington v. Dague*, 505 U.S. 557, 112 S.Ct. 2638 (1992); *Lederhaus v. Pashen & Midwest Inspection Service, Ltd.*, 91-ERA-13 (Sec'y Jan. 13, 1993) (holding that *Dague* applies to whistleblower statutes). Rather, Complainant's counsel should submit to this office a fee petition detailing the work performed, the time spent on such work, and the hourly rate of those performing the work. *West v. Systems Applications International*, 94-CAA-15 (Sec'y Apr. 19, 1995). Complainant must also submit an itemization of any costs incurred by counsel. *Id.*

RECOMMENDED ORDER

IT IS HEREBY RECOMMENDED THAT:

1. Respondent Weststar, Inc. be ordered to:

   A. Pay to Complainant back pay in the amount of $12,605 for the period January 16, 1998 to May 8, 1998;

   B. Inform Complainant of the date on which the Manchester project was completed, and pay to Complainant back pay from May 8, 1998 until the ending date of the Manchester project, to be calculated at the rate of pay he earned at the PSNS hammerhead crane work site, minus his interim earnings during that same period.

   B. Pay to Complainant interest on the back pay from the date the payments were due as wages until the actual date of payment. The rate of interest is payable at the rate established by section 6621 of the Internal Revenue Code, 26 U.S.C. § 6621;

   C. Pay to Complainant compensatory damages in the amount of $11,320.33; and

   D. Pay to Complainant all costs and expenses, including attorney fees, reasonably incurred by him in connection with this proceeding. Thirty (30) days is hereby allowed to Claimant's counsel for submission of an application of attorney fees. A service sheet showing that service has been made upon Respondents and Complainant must accompany the application. Parties have ten (10) days following receipt of such application within which to file any objections.

Thomas M. Burke
Associate Chief Judge

Washington, DC
TMB/msm

NOTICE: This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. § 24.8, a petition for review is timely filed with the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, NW, Washington, DC 20210. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall be served on all parties and on the Chief Administrative Law Judge, *See* 29 C.F.R. §§ 24.8 and 24.9, as amended by 63 Fed. Reg. 6614 (1998).